

5.1.1 Elements of a Title VII Claim— Disparate Treatment — Mixed-Motive

Model

In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [protected status] was a motivating factor in [defendant's] decision [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove both of the following by a preponderance of the evidence:

First: [Defendant] [failed to hire] [failed to promote] [demoted] [terminated] [constructively discharged] [plaintiff]; and

Second: [Plaintiff's] [protected status] was a motivating factor in [defendant's] decision.

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal civil rights.

In showing that [plaintiff's] [protected class] was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that [his/her] [protected status] was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [plaintiff's protected class] played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant].

As used in this instruction, [plaintiff's] [protected status] was a “motivating factor” if [his/her] [protected status] played a part [or played a role] in [defendant's] decision to [state adverse employment action] [plaintiff].

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3 **[For use where defendant sets forth a “same decision” affirmative defense:**
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5 If you find that [defendant's] treatment of [plaintiff] was motivated by both
6 discriminatory and lawful reasons, you must decide whether [plaintiff] is entitled
7 to damages. [Plaintiff] is not entitled to damages if [defendant] proves by a
8 preponderance of the evidence that [defendant] would have treated [plaintiff] the
9 same even if [plaintiff's] [protected class] had played no role in the employment
10 decision.]
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15 **Comment**
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17 The Supreme Court has ruled that direct evidence is not required for a
18 plaintiff to prove that discrimination was a motivating factor in a "mixed-motive"
19 case, , i.e., a case in which an employer had both legitimate and illegitimate
20 reasons for making a job decision. *Desert Palace Inc. v. Costa*, 539 U.S. 90
21 (2003). The mixed-motive instruction above tracks the instruction approved in
22 *Desert Palace*.
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24 The distinction between “mixed-motive” cases and “pretext” cases is
25 generally determined by whether the plaintiff produces direct rather than
26 circumstantial evidence of discrimination. If the plaintiff produces direct evidence
27 of discrimination, this is sufficient to show that the defendant’s activity was
28 motivated at least in part by animus toward a protected class, and therefore a
29 “mixed-motive” instruction is given. If the evidence of discrimination is only
30 circumstantial, then defendant can argue that there was no animus at all, and that
31 its employment decision can be explained completely by a non-discriminatory
32 motive; it is then for the plaintiff to show that the alleged non-discriminatory
33 motive is a pretext, and accordingly Instruction 5.1.2 should be given. *See*
34 *generally Fakete v. Aetna, Inc.*, 308 F.3d 335 (3d Cir. 2002) (using “direct
35 evidence” to describe “mixed-motive” cases and noting that pretext cases arise
36 when the plaintiff presents only indirect or circumstantial evidence of
37 discrimination).
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1 On the proper use of mixed-motive instructions, see Matthew Scott and
2 Russell Chapman, *Much Ado About Nothing — Why Desert Palace Neither*
3 *Murdered McDonnell Douglas Nor Transformed All Employment Discrimination*
4 *Cases To Mixed-Motive*, 36 St. Mary's L.J. 395 (2005):
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6 Thus, a case properly analyzed under [42 U.S.C.] § 2000e-2(a) (what
7 some commentators refer to as pretext cases) involves the plaintiff alleging
8 an improper motive for the defendant's conduct, while the defendant
9 disavows that motive and professes only a non-discriminatory motive. On
10 the other hand, a true mixed motive case under [42 U.S.C.] § 2000e-2(m)
11 involves either a defendant who . . . *admits* to a partially discriminatory
12 reason for its actions, while also claiming it would have taken the same
13 action were it not for the illegitimate rationale or . . . [there is] otherwise
14 credible evidence to support such a finding.
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16 The rationale for the distinction . . . is simple. When the defendant
17 renounces any illegal motive, it puts the plaintiff to a higher standard of
18 proof that the challenged employment action was taken *because of* the
19 plaintiff's race/color/religion/sex/national origin. But, the plaintiff, if
20 successful, is entitled to the full panoply of damages under § 2000e-5. . . .
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22 At the same time, where the defendant is contrite and admits an
23 improper motive (something no jury will take lightly), or there is evidence
24 to support such a finding, the defendant's liability risk is reduced to
25 declaratory relief, attorneys' fees and costs if the defendant proves it would
26 have taken the same action even without considering the protected trait. The
27 quid pro quo for this reduced financial risk is the lesser standard of liability
28 (the challenged employment action need only be a motivating factor).
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31 *Distinction Between Disparate Impact and Disparate Treatment; Elements of*
32 *Disparate Treatment Claim*
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34 The Third Circuit has set out the elements of a disparate treatment
35 claim—and distinguished a disparate impact claim — in *E.E.O.C. v. Metal Service*
36 *Co.*, 892 F.2d 341, 347-348 (3d Cir. 1990):
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38 A violation of Title VII can be shown in two separate and distinct
39 ways. *See generally Watson v. Fort Worth Bank and Trust*, 487 U.S. 977

1 (1988). First, a Title VII plaintiff can utilize the disparate impact theory of
2 discrimination. A disparate impact violation is made out when an employer
3 is shown to have used a specific employment practice, neutral on its face but
4 causing a substantial adverse impact on a protected group, and which cannot
5 be justified as serving a legitimate business goal of the employer. See *Wards*
6 *Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989) (like the analytical
7 proof structure under the disparate treatment theory, the burden of showing
8 disparate impact always remains with the plaintiff and the employer has
9 only the burden of production, on the issue of business justification, once a
10 prima facie case has been established). No proof of intentional
11 discrimination is necessary.

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13 Alternatively, the Title VII plaintiff can argue a disparate treatment
14 theory of discrimination. . . . A disparate treatment violation is made out
15 when an individual of a protected group is shown to have been singled out
16 and treated less favorably than others similarly situated on the basis of an
17 impermissible criterion under Title VII. Unlike the disparate impact theory,
18 proof of the employer's discriminatory motive is critical under this analysis.
19 Discriminatory intent can either be shown by direct evidence, or through
20 indirect or circumstantial evidence. See, e.g., *McDonnell Douglas Corp. v.*
21 *Green*, 411 U.S. 792 (1973).

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23 If discriminatory intent is shown indirectly, the burden of production
24 can be shifted to the employer once the plaintiff establishes a prima facie
25 case of discrimination. The employer's burden is to articulate a legitimate,
26 nondiscriminatory reason for the adverse action. However, the ultimate
27 burden of persuasion on the issue of intent remains with the Title VII
28 plaintiff. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253
29 (1981).

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31 In the seminal case of *McDonnell Douglas*, the Supreme Court set
32 forth the by now quite familiar four-prong test for what constitutes a prima
33 facie case.:

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35 (i) that [the complainant] belongs to a racial minority; (ii) that [the
36 complainant] applied and was qualified for a job for which the
37 employer was seeking applicants; (iii) that, despite [the
38 complainant's] qualifications, [the complainant] was rejected; and (iv)
39 that, after his rejection, the position remained open and the employer

1 continued to seek applicants from persons of complainant's
2 qualifications.
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4 However, the Court cautioned that the "facts necessarily will vary in Title
5 VII cases, and the specification . . . of the prima facie proof required from
6 [the complainant] is not necessarily applicable in every respect to differing
7 factual situations." *McDonnell Douglas*, 411 U.S. at 802 n. 13. Since
8 *McDonnell Douglas*, the Supreme Court has held consistently that the
9 *McDonnell Douglas* test forms one model of a prima facie case, not an
10 invariable scheme.
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12 This court has noted similarly that the *McDonnell Douglas* prima
13 facie test should not be viewed as a rigid formula and the elements
14 enumerated in *McDonnell Douglas* need not be present in every Title VII
15 case. *Kunda v. Muhlenberg College*, 621 F.2d 532, 542 (3d Cir. 1980) ("of
16 necessity this cannot be an inflexible rule")
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18 Thus, since the importance of *McDonnell Douglas* lies, not in its
19 specification of the discrete elements of proof there required, but in its
20 recognition of the general principle that any Title VII plaintiff must carry
21 the initial burden of offering evidence adequate to create an inference that
22 an employment decision was based on a discriminatory criterion illegal
23 under the Act, courts need not, and should not, stubbornly analyze all Title
24 VII factual scenarios through the *McDonnell Douglas* formula. Instead,
25 courts must be sensitive to the myriad of ways such an inference can be
26 created. Simply stated, a Title VII plaintiff has established a prima facie
27 case when sufficient evidence is offered such that the court can infer that if
28 the employer's actions remain unexplained, it is more likely than not that
29 such actions were based on impermissible reasons.
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32 "*Same Decision*" Affirmative Defense in Mixed-Motive Cases 33

34 Where the plaintiff has shown intentional discrimination in a mixed motive
35 case, the defendant can still avoid liability for money damages by demonstrating
36 by a preponderance of the evidence that the same decision would have been made
37 even in the absence of the impermissible motivating factor. If the defendant
38 establishes this defense, the plaintiff is then entitled only to declaratory and
39 injunctive relief, attorney's fees and costs. Orders of reinstatement, as well as the

1 substitutes of back and front pay, are prohibited if a same decision defense is
2 proven. 42 U.S.C. §2000e-(5)(g)(2)(B).